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No. 03-1164

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. Review Is Warranted To Decide Whether The Beef Act Is Constitutional Under The Government Speech Doctrine

1. Respondents contend that review is unwarranted in this case because the court of appeals' invalidation of the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, was "pre-ordained" by this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). Br. in Opp. 2. In *United Foods*, however, the Court expressly refrained from deciding whether a similar generic advertising program involved government speech because that issue was not raised or addressed in the court of appeals. 533 U.S. at 416-417. In contrast, the government relied on the government speech doctrine to defend the Beef Act in in this case and the court of appeals expressly resolved that issue, holding that the government speech doctrine does not

support the constitutionality of the Beef Act. Pet. App. 11a-18a. The government speech issue is therefore squarely presented here, and nothing in *United Foods* addresses, much less preordains, the proper resolution of that issue.

2. Nor does the absence of a circuit split on whether the Beef Act is constitutional under the government speech doctrine lessen the need for this Court's review. Br. in Opp. 17. The court of appeals in this case invalidated an Act of Congress, Pet. App. 28a, and the invalidation of an Act of Congress is itself an independent reason for this Court to grant review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). Moreover, the generic advertising program under that Act of Congress has been in effect for more than 15 years and has formed an integral part of the federal government's promotion of beef, education of consumers, and stabilization of an important sector of the Nation's economy. An appellate decision invalidating an Act of Congress and an important and longstanding program established under that Act should not be left unreviewed by this Court.

The government speech question presented in this case is also one of exceptional and recurring importance. Congress has authorized, and the Secretary of Agriculture has implemented, generic advertising of several other agricultural commodities. See Pet. 23. The Court's resolution of the government speech issue in this case will have a direct bearing on the constitutionality of those other programs. The States have also established programs for generic advertising of commodities. Because of the importance of the question presented to them, thirty States and Puerto Rico have filed an amicus brief urging the Court to grant review.

3. Respondents argue that the government speech doctrine does not support the constitutionality of the Beef Act. Br. in Opp. 17-25. The Court should address that contention after it grants review, receives full briefing, and hears oral argument. Respondents' merits-based argument is not a reason for denying review.

In any event, respondents err in characterizing Beef Act speech as private speech. Br. in Opp. 17-22. Congress itself has specified the content of the message to be conveyed under the Beef Act—that it is desirable to eat beef. 7 U.S.C. 2902(13) (defining "promotion" to mean action, including advertising, "to advance the image and desirability of beef and beef products"). Congress has selected that message in order to further important government purposes—to promote adequate nutrition and the national economy. 7 U.S.C. 2901(a)(3) and (4). Congress has established an entity whose members are selected by the Secretary of Agriculture (the Beef Board) to help carry out some of the administrative responsibilities under the Act. 7 U.S.C. 2904(1). And Congress has entrusted the Secretary with the ultimate responsibility to ensure that Beef Act advertising campaigns advance the government's message and further government objectives. 7 U.S.C. 2904(4)(C) and (6)(B) (approval authority). Whatever the precise contours of the government speech doctrine, those features in combination are more than sufficient to make Beef Act speech government speech.

a. In arguing that Beef Act speech is not government speech, respondents mistakenly rely on *Keller* v. *State Bar*, 496 U.S. 1 (1990). Br. in Opp. 17. In that case, the Court held that a state bar responsible for regulating the legal profession was not engaged in government speech when it expressed opinions on issues

such as gun control and a nuclear freeze initiative. Respondents' reliance on *Keller* is misplaced because that case did not involve *any* of the features that make Beef Act speech government speech. The state legislature did not specify that the state bar should favor gun control or a nuclear freeze; the bar's positions on those issues did not further a government purpose; a politically accountable state official did not appoint a majority of the members to the governing body of the state bar; and a politically accountable state official did not approve the bar's positions before they were disseminated.

b. Respondents similarly err in contending that Beef Act speech is not government speech because it is financed through a targeted legislative assessment, rather than a general tax. Br. in Opp. 18-19. The government speech doctrine applies when funds "raised by the government" are used to promote the government's policies, *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000), and that test is satisfied regardless of whether the government raises money to promote its message through a targeted assessment or a general tax on the public.

Nor is there any basis for drawing a distinction between the two forms of government funding. In either event, the government has assumed responsibility for raising the money necessary to ensure the dissemination of its message, and a financial obligation is imposed on persons who may disagree with the government's point of view. In order to minimize the financial burden on them, respondents may prefer that Congress fund the Beef Act program through a general tax, rather than a targeted assessment. But Congress could reasonably decide to impose the financial burden on the class of persons who would benefit most directly from

the government's pro-beef message, rather than the public at large. 7 U.S.C. 7401(b)(2).

c. Contrary to respondents' contention, the involvement of cattle producers as members of the Beef Board does not transform the Beef Board into a private entity, much less transform Beef Act speech into private speech. Br. in Opp. 19-20. The Beef Board is a government entity under this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). That decision holds that an entity qualifies as a government entity when (1) it is created by Congress, (2) it is designed to serve a government objective, and (3) a majority of its members are appointed by the government. *Id.* at 400. Each of those requirements is satisfied here.

Respondents claim that the *Lebron* standard applies only when the question is whether an entity is constrained by the First Amendment, not when the question is whether the government is speaking. Br. in Opp. 20-21. As a matter of logic, however, there is no reason why the test should be different. If Amtrak is a government entity when it constrains private speech, as the Court held in *Lebron*, there is no reason that it would not also be a government entity when it promotes rail transportation.

In light of *Lebron*, the assertion that the Beef Board has characterized its activities as private rather than governmental is beside the point. Br. in Opp. 19. Just as Amtrak could not transform itself into a non-government entity by calling itself one, see 513 U.S. at 392-394, the Beef Board may not do so either.

In deciding whether Beef Act speech is government speech, however, it ultimately does not matter whether the Beef Board is a governmental or private entity. Under the Court's decisions, Congress is free to enlist

private entities to help promote a government message. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541-542 (2001); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust* v. *Sullivan*, 500 U.S. 173, 192-193 (1991). Thus, even if the Beef Board were a private entity, Congress could enlist its help in promoting the government's message that it is desirable for people to eat beef.

d. In an effort to escape the government speech doctrine, respondents also try to minimize the role of the Secretary of Agriculture. The Act specifically requires, however, that the Secretary must approve every plan or project for implementing the Beef Act, 7 U.S.C. 2904(6)(B), and the record shows that the Secretary, through the Agricultural Marketing Service, works closely with the Beef Board and Operating Committee from the inception to reduce potential concerns and to ensure that the message prescribed by Congress will be communicated. See Pet. 6-7; C.A. App. 453-456, 479-480 (USDA officials attend all meetings of the Beef Board and Operating Committee); *id.* at 453 ("USDA officials provide input and advice at every stage of project and budget development—from germination to final approval."); Tr. 293-294 (USDA officials are "involved in the activities of the Beef Board every day"); Tr. 388 (USDA oversight is a "full-time operation"). The relevant federal agency in *Rust* did not have any comparable prior approval authority or involvement in the development of particular communications to promote the government's message, yet the Court sustained that program under the First Amendment.

In any event, regardless of the precise level of the Secretary's involvement in the selection of particular advertisements, it remains the case that Congress has

chosen the basic message to be conveyed; it has done so to further important government objectives; and the Secretary ensures that Congress's message is conveyed and the government's purposes are served. Those characteristics of the Beef Act program are more than sufficient to make Beef Act speech government speech.

e. Relying on *Wooley* v. *Maryland*, 430 U.S. 705 (1997), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), respondents also contend that, even if Beef Act speech is government speech, the Beef Act violates the principle that the government may not compel a person to speak. Br. in Opp. 24. But respondents are not required to bear the government's message on their own property, as in *Wooley*; nor are they required to affirm a message through their own lips and a salute, as in *Barnette*. Instead, they are simply required to help pay for advertising. Accordingly, *Wooley* and *Barnette* are "clearly inapplicable to the regulatory scheme at issue here." *Glickman* v. *Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 470 (1997).

Respondents are similarly incorrect in asserting that *Keller* and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), hold that the government may not coerce financial support for government speech. Br. in Opp. 23. Neither *Keller* nor *Abood* involved government speech. And, under the government speech doctrine, the government is entitled to require private entities and persons to make financial contributions to support its own policies. *Southworth*, 529 U.S. at 229; *Keller*, 496 U.S. at 12-13.

In seeking to extend the coerced funding principle applied in *Keller* and *Abood* to government speech, respondents distinguish between financial support required from the public at large, which they regard as permissible, and financial support required from a tar-

geted group, which they regard as impermissible. Br. in Opp. 24. But as previously discussed, there is no constitutionally relevant distinction between the two. And the government's policy decision to impose the costs of a government program on persons who most directly benefit makes eminent sense. In any event, if the *Keller* and *Abood* principle were extended to the government speech context, it would only bar the government from using funds for advertising that is not germane to promoting the government's message, see *Keller*, 496 U.S. at 14; *Abood*, 431 U.S. at 235-236, and none of the funds collected under the Beef Act fall into that category.

B. Review Is Warranted To Resolve The Question Whether The Beef Act Is Constitutional Under The Commercial Speech Doctrine

If the use of Beef Act assessments to fund the government's pro-beef message is not per se permissible under the First Amendment, this case would then present the question whether such a program of government speech is constitutional because it satisfies the standards for government regulation of commercial speech. Respondents err in contending that *Glickman* and *United Foods* foreclose that defense of the Beef Act. Br. in Opp. 25-26. Neither case addressed whether the advertising at issue involved government speech, much less whether the imposition of an assessment to finance government speech on a product is constitutional when it satisfies commercial speech standards.

Other than incorrectly asserting that this Court's decisions have foreclosed the argument, respondents do not explain why the Beef Act cannot be defended under the commercial speech doctrine. Nor could they. A

government program that compels funding for advancing the government's message to promote the sale of a product poses less danger to First Amendment values than government restrictions on a private party's own commercial speech. Furthermore, under the First Amendment standards applicable to commercial speech, the Beef Act is constitutional. The government's interest in promoting nutrition and the general economy are substantial, and the Beef Act is appropriately tailored to further those substantial interests. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

C. Review Is Warranted On The Scope Of The Remedy

Respondents contend that the scope of the remedy ordered by the courts below does not warrant this Court's review. Br. in Opp. 27. Review of that issue is warranted, however, because the scope of the remedy vastly exceeds what is permissible under this Court's cases. When the government requires persons to pay funds to promote speech in violation of the *Abood* principle, this Court's cases instruct that the appropriate remedy is to reduce the assessment of a person who objects to the speech in proportion to the amount used to promote the objected-to speech. *Abood*, 431 U.S. at 240-241. The remedy affirmed by the court of appeals exceeds that established limitation in two respects. It enjoins the collection of assessments from parties who do not object to the assessment; and it enjoins the collection of assessments used to fund permissible activities other than advertising, such as research.

Contrary to respondents' contention, the government does not argue that each objecting party must file his or her own lawsuit. Br. in Opp. 27. Instead, an appropriate remedy would be to require the Secretary to modify

the current check-off scheme so as to give each person subject to a Beef Act assessment an opportunity to opt out of that portion of the assessment to be used for advertising. Under the remedy that the lower courts ordered, persons who are willing to support Beef Act advertising would be deprived of the opportunity to do so. There is no justification for that result.

The absence of a severability clause in the Beef Act also does not support the lower courts' excessive remedy. Br. in Opp. 28. When there is no severability clause, a court should enjoin only those parts of the program that are affected by the violation, unless there is evidence that Congress intended for the entire program to stand or fall together. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684, 686 (1987). A program that relies on voluntary contributions for advertising and mandatory assessments for research and other activities would make a substantial contribution to Congress's goals, and there is no evidence that Congress would have wanted to terminate the Beef Act program entirely simply because its goals could not be fully realized.

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For the foregoing reasons as well as those in the petition, the petition for a writ of certiorari should be granted.

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